# Petition

81-748

NO. _____

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM 1981

---

HAROLD A. THOREEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

FREDRIC C. TAUSEND
SCHWEPPE, DOOLITTLE, KRUG,
TAUSEND & BEEZER, P.S.
Counsel of Record for
Petitioner

Office & P.O. Address:
1600 Peoples National Bank
Building
1415 Fifth Avenue
Seattle, Washington 98171
(206) 223-1600

October 16, 1981

---

## QUESTIONS PRESENTED

1. Whether a criminal defense counsel should be held in criminal contempt for conduct, undertaken in the course of representing his client, where the conduct was neither knowingly nor recklessly obstructive of justice nor in fact obstructive of justice?

2. Whether a criminal defense counsel who reasonably believes identification of his client, the defendant, to be a necessary element of the government's case, and who therefore substitutes an individual for the defendant at counsel table as a means of testing the credibility of government witnesses on that issue, thus acting to preserve his client's Sixth Amendment right to effective representation, can be held in criminal contempt for not first notifying opposing counsel and the court of his impeachment strategy?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below . . . . . | 1 |
| Jurisdiction . . . . . | 2 |
| Constitutional Provisions, Statutes and Regulations Involved. . . . . | 2 |
| Statement of the Case . . . . . | 3 |
| Reasons for Granting the Writ . . . . | 10 |
| 1. The Decision of the Court of Appeals Conflicts With the Decisions of This Court and Other Courts of Appeals as to the Elements of Actual Obstruction of Justice and Intent Required to Support a Criminal Contempt Conviction Under 18 U.S.C. §§ 401(1) and (3). . . . . | 10 |
| 2. The Decision of the Court of Appeals Impairs the Sixth Amendment Guarantee of Rights to Counsel in Criminal Cases by Unnecessarily Restricting Defense Counsel's Freedom in Cross-Examination and Impeachment of Prosecution Witnesses . . | 19 |
| Conclusion. . . . . | 28 |
| Appendices | |
| Appendix A . . . . . | A-1 |
| Appendix B . . . . . | A-45 |

## TABLES OF AUTHORITY

### Table of Cases

Page

In re Brown, 454 F.2d 999 (D.C. Cir. 1971) . . . . . 11,12,14,15,16, et seq.

In re Dellinger, 461 F.2d 289 (7th Cir. 1972) . . . . . 26

In re Farquhar, 492 F.2d 561 (D.C. Cir. 1973) . . . . . 11,13,14,15,16, et seq.

In re Friedman, 76 Ill. 2d 392, 392 N.E.2d 1333 (1979). . . . . 16

In re McConnell, 370 U.S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962) . . . . . .10,11,13,17,25 et seq.

In re Michael, 326 U.S. 224, 66 S. Ct. 78, 90 L. Ed. 30 (1945). .11-12,13

Sykes v. United States, 444 F.2d 928 (D.C. Cir. 1971). . . . . 14

United States ex rel. Robson v. Oliver, 470 F.2d 10 (7th Cir. 1972) . . . . . .19,26-27

United States v. Sibbett, MS78-98T (W.D. Wash. 1980) . . . . . 4

Page

United States v. State of Washington, 459 F. Supp. 1020 (W.D. Wash.), aff'd sub nom., Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978), vacated in part and remanded sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) . . . . . 5

United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) . . . . . 19-21

Constitutional Provisions

U.S. Const. amend. VI . . . . . 2

Statutes

18 U.S.C. § 401 . . . . . 2-3,10,11

28 U.S.C. § 1254(1) . . . . . 2

Rules and Regulations

U.S. Sup. Ct. Rule 20.1, 38 U.S.C.A. 2

Other Authority

8 Annals of Congress 157 (1805) . . . 21-22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

---

HAROLD A. THOREEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

## OPINIONS BELOW

The opinion of the court of appeals, United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981), appears in the Appendix hereto together with the unpublished Order of Contempt rendered by the District Court for the Western District of Washington on March 31, 1980.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 17, 1981. This petition for certiorari was filed within 60 days of that date as required by U.S. Sup. Ct. Rule 20.1, 28 U.S.C.A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. Amend. VI, Jury Trial for Crimes and Procedural Rights:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 401, Power of Court.

> A court of the United States shall have power to punish by fine or

imprisonment, at its discretion, such contempt of its authority, and none other, as --

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior by any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

## STATEMENT OF THE CASE

This case arises out of a criminal contempt conviction under 18 U.S.C. §§ 401(1) and (3) where an attorney was found in criminal contempt for pursuing a course of aggressive advocacy while representing his client in a criminal proceeding. Without the prior knowledge of the prosecutor or the court, the attorney substituted someone for his client at counsel table with the intent of impeaching the government's witnesses by inducing them to misidentify the defendant. The facts, although disputed in some particulars, are

conceded for purposes of this petition. Those facts are set forth in the opinion of the Ninth Circuit below, but a brief synopsis of the case will allow expression of several facts which were not reported in the court's opinion as well as allow correction of erroneous conclusions which the Ninth Circuit drew from the facts.

At the time of the instant criminal contempt hearing the defendant-attorney, Harold Thoreen, had practiced law for almost five years, and was a member of the bars of the State of Washington and the Western District of Washington. On February 15, 1980, during the non-jury criminal contempt trial of United States v. Sibbett, MS78-98T (W.D. Wash. 1980), before the Honorable Jack E. Tanner, defendant-attorney Thoreen defended Mr. Sibbett on criminal contempt charges for violation of a preliminary injunction against salmon fishing. The preliminary injunction

involved in that case has been reviewed by this Court in United States v. State of Washington, 459 F. Supp. 1020 (W.D. Wash.), aff'd sub nom., Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978), vacated in part and remanded sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979).

Prior to trial the government provided the defense with a list of the prosecution witnesses and an investigatory report, prepared by a government witness, National Marine Fisheries Service Agent Severtson. In reviewing the government's evidence with Sibbett in preparation for trial, Thoreen discovered a conflict in the testimony of Agent Severtson and Coast Guard Officer BMI Hassler, both government witnesses, which weakened the assertion that Sibbett had been observed fishing in violation of the

preliminary injunction. Attorney Thoreen concluded that impeaching Severtson's identification was his client's best defense.

To test the witnesses' identification, Thoreen placed a man named Clark Mason next to him at the counsel table. Mason bore some physical resemblance to Sibbett and at the trial was dressed in outdoor clothing. Sibbett wore a business suit and large round glasses and sat in a conspicuous place immediately behind the rail in a row normally reserved for the press. Thoreen did not request the court's approval of this strategy or notify the court or the prosecution of the substitution.

On Thoreen's motion at the start of the trial, the court ordered all witnesses from the courtroom as a means of preventing conscious or unconscious collusion among the witnesses scheduled to testify. Mason remained at counsel table. For purposes of

this petition only, petitioner will concede that throughout the government's case Thoreen made and allowed to go uncorrected numerous misrepresentations which suggested to the government's witnesses that the individual at the counsel table was in fact the defendant Sibbett. He gestured to Mason as though he were his client and gave Mason a yellow pad on which to take notes. The two conferred. Thoreen did not correct the court when it referred to Mason as the defendant during the course of an evidentiary ruling on the admissibility of certain of Sibbett's out-of-court statements, and also did not disclose the substitution when the court acceded to the government's request that the record show that Agent Severtson had identified Sibbett when in fact Severtson had identified Mason as Sibbett.

During the government's direct examination two government witnesses misidentified Mason as Sibbett. Following the government's case-in-chief, Thoreen called Mason as a witness and disclosed the substitution. On cross-examination of Mason the United States Attorney elicited an identification of Sibbett who, as noted, was present in the courtroom. The court on its own motion then continued the case for one week.

When the trial resumed, the government, after a reminder from the court, called as a rebuttal[1] witness Agent Severtson, the same government witness who had

---

[1] Although the Ninth Circuit Court of Appeals characterized the evidence elicited at the reconvened proceeding as a "reopening" of the government's case, United States v. Thoreen, No. 80-3137, slip op. at 4159 (9th Cir. August 17, 1981), the record indisputably shows that this was simply rebuttal testimony.

originally identified Mason as Sibbett, and who had been present in the courtroom throughout the earlier disclosure of the substitution. Agent Severtson identified Sibbett who was then convicted of all three injunction violation charges.

On February 20, 1980, Thoreen was ordered to appear on February 27, 1980, and show cause why he should not be held in criminal contempt. At the hearing, Judge Tanner found Thoreen in criminal contempt. An Order of Contempt was lodged with the court on March 28, 1980, which order was affirmed by the Ninth Circuit on August 17, 1981. Disciplinary proceedings of the Washington State Bar Association arising as a direct result of the contempt conviction have been stayed pending the determination of this writ.

## REASONS FOR GRANTING THE WRIT

The questions presented by this petition deal with (1) the propriety of a criminal contempt conviction absent deliberate or reckless conduct constituting a willful violation which actually and materially obstructs the administration of justice and (2) the proper role and permissible tactics of defense counsel in cross-examining or otherwise testing the credibility of a prosecution witness. These two questions while related are distinct.

### 1. The Decision of the Court of Appeals Conflicts With the Decisions of This Court and Other Courts of Appeals as to the Elements of Actual Obstruction of Justice and Intent Required to Support a Criminal Contempt Conviction Under 18 U.S.C. §§ 401(1) and (3)

The decision of the court of appeals is in conflict with the decision of this Court in In re McConnell, 370 U.S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962), and in conflict with decisions of other court

of appeals, specifically, In re Farquhar, 492 F.2d 561 (D.C. Cir. 1973) and In re Brown, 454 F.2d 999 (D.C. Cir. 1971).

In In re McConnell, 370 U.S. 230, 233 (1962), this Court reaffirmed that the statute under which petitioner was summarily convicted of contempt, 18 U.S.C. § 401, was intended as a "drastic delimitation" of the power of federal courts to punish for contempt. Consistent with that, courts have required findings of obstructionist intent and an actual material obstruction of justice as prerequisites to a finding of criminal contempt. See, e.g., In re Brown, supra. This Court should reaffirm these prerequisites as the most effective means of satisfying the Congressional intent of limiting federal courts' contempt powers to the "least possible power adequate to the end proposed", fair and efficient administration of justice. See, In re Michael,

326 U.S. 224, 227, 66 S. Ct. 78, 90 L. Ed. 30 (1945).

In In re Brown, the court reversed a finding of criminal contempt primarily basing the reversal upon the absence of sufficient evidence to prove beyond a reasonable doubt that the defendant-attorney acted with the requisite contumacious intent when he made an unlicensed appearance before the district court to represent an indigent client. In explaining the degree of intentional wrongdoing which is a necessary ingredient to the offense of criminal contempt the court stated:

> The foundation for the criminal contempt power is the need to protect the judicial process from willful impositions, particularly those designed to hobble the normal machinery of justice . . . . Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt. . . .

In re Brown, 454 F.2d, supra, at 1006-7. In defining the required intent as knowledge

of wrongfulness and a purpose nontheless to act, the court explained that reserving the exercise of the criminal contempt power to conduct that actually demands its use is consistent with the policy and spirit underlying the legislative grant. Id., at 1006. The admonition of In re McConnell that

> "[t]he exercise by federal courts of any broader contempt power than this . . . would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury"

supports the District of Columbia Circuit's definition of the element of intent necessary to a finding of criminal contempt. In re McConnell, 370 U.S. 230, 234 (1961) (quoting In re Michael, 326 U.S. 224, 227 (1945)).

In In re Farquhar, 492 F.2d 561 (D.C. Cir. 1973), the court reversed a finding of criminal contempt based upon an attorney's

tardiness that caused a delay in the proceedings because the record did not show that the attorney possessed the requisite wrongful intent to commit the crime of contempt. In holding that criminal contempt requires both a contemptuous act and a wrongful state of mind the court stated: "By definition, contempt is a 'willful disregard or disobedience of a public authority'. The requisite intent may be inferred if a lawyer's conduct discloses a reckless disregard . . . of his obligation to the court." Id., at 564 (quoting Sykes v. United States, 444 F.2d 928, 930 (D.C. Cir. 1971)).

Although the Farquhar recklessness standard is lower than the Brown knowledge and purpose requirement both are clearly inconsistent with the Thoreen court's definition of the requisite contumacious intent. The court of appeals apparently does not dispute Thoreen's assertions that

his trial conduct "was a good faith effort to prove misidentification and attack the credibility of the government witnesses . . . and that he never intended to misrepresent any facts to the court or to obstruct justice . . . ." United States v. Thoreen, No. 80-3137, slip op. at 4166 (9th Cir. August 17, 1981). Nonetheless the court of appeals stated:

> His alleged lack of intent to deceive the court or to obstruct justice is irrelevant. Section 401(1) does not require specific intent. It suffices that he should have been aware that his conduct exceeded reasonable limits and hindered the search for truth.

Id. (Emphasis added.) As defined by the court of appeals this standard requires at best nothing more than mere negligence and at worst only the exercise of poor judgment.

Both the Farquhar and Brown courts noted that the attorney's good faith is a countervailing factor to imposing criminal

contempt penalties. See, In re Farquhar, 492 F.2d 561, 564 (D.C. Cir. 1973); In re Brown, 454 F.2d 999, 1007 (D.C. Cir. 1971) ("Good faith pursuit of a plausible though mistaken alternative is antithetical to contumacious intent, however unimportant it may be in the context of civil contempt.") In a case involving prosecutorial misconduct, the Supreme Court of Illinois ruled that no sanctions should be imposed where the prosecutor "acted without the guidance of precedent or settled opinion and because there [was] apparently considerable belief . . . that he acted properly . . . ." In re Friedman, 76 Ill. 2d 392, 392 N.E.2d 1333, 1336 (1979).

In addition to the requisite intent, actual obstruction of justice, not present in the instant cause, is necessary to sustain a criminal contempt conviction. In reversing the criminal contempt convictions in those cases, both the Farquhar and Brown

courts relied upon this Court's holding in In re McConnell, 370 U.S. 230, 234 (1961), that "before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures" there must be an actual obstruction of the judge in the performance of his judicial duty, which obstruction must be clearly and precisely proved. The trial court and the court of appeals, by their characterization of the facts in this case as "obstruction", undermine the requirements of McConnell, Farquhar and Brown. The court of appeals, in justifying its finding of actual obstruction, relied upon the delay in the proceedings which resulted from Thoreen's substitution of Mason for Sibbett, specifically "the time taken for witnesses' misidentification of the defendant and the time required to recall one witness to identify Sibbett correctly". United

States v. Thoreen, No. 80-3137, slip op. at 4165 (9th Cir. August 17, 1981). But if, as we show below, Thoreen's substitution of Mason for Sibbett at counsel table was at least arguably within the permissible bounds of zealous advocacy, then the fact that it was partially successful requiring the government to rehabilitate a witness in rebuttal is consistent with a just and fair trial. Obstruction would have occurred if, for example, the district court had convicted the wrong man, Mason instead of Sibbett, or if the court had relied on its assumption that the person sitting at counsel table was the defendant in making a material ruling, but nothing like that happened in this case. Where a lawyer is attempting in good faith to meet his obligation to represent his client and where he has no intention to mislead or deceive the court, detrimental reliance by the court on any incidental and temporary

"misrepresentation" which flows from the lawyer's strategy should be a prerequisite to a conclusion that justice has in fact been obstructed.

2. The Decision of the Court of Appeals Impairs the Sixth Amendment Guarantee of Rights to Counsel in Criminal Cases by Unnecessarily Restricting Defense Counsel's Freedom in Cross-Examination and Impeachment of Prosecution Witnesses

The decision of the court of appeals that Thoreen's impeachment tactic of substituting Mason for Sibbett at counsel table in order to confuse the government's witnesses was clearly outside the bounds of protected behavior is contrary to the decisions of other circuit courts of appeals, see, e.g., United States ex rel. Robson v. Oliver, 470 F.2d 10 (7th Cir. 1972), as well as to the principles enunciated in United States v. Wade, 388 U.S. 218, 256-258, 87 S. Ct. 1926, 18 L. Ed. 2d

1149 (1967) (Justice White dissenting in part and concurring in part).

Effective representation of a criminal defendant, which is the end sought by the Sixth Amendment guarantee of right to counsel, directly affects the proper role of defense counsel concerning "the court's ability to ascertain the truth." United States v. Thoreen, No. 80-3137, slip op. at 4165 (9th Cir. August 17, 1981).

In his dissenting and concurring opinion in Wade, Justice White described the obligations of defense counsel as follows:

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth . . . . If he can confuse a witness, even a

> truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course . . . . Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 256-8 (1967) (Justice White dissenting in part and concurring in part).

Justice White's description finds strong support in Representative Randolph's comments as prosecutor in the 1805 impeachment trial of Associate United States Supreme Court Justice Samuel Chase before the United States Senate:

> It is one of the most glorious attributes of jury trial, that in criminal cases (particularly such as are capital) the prisoner's counsel

> may (and they often do) attempt to "deceive and mislead the jury." It is essential to the fairness of the trial, that it should be conducted in perfect freedom . . . . The free principles of our governments, individual and federal, teach us to make every humane allowance in his favor, to grant him, with a liberality unknown to the narrow and tyrannous maxims of most nations, every indulgence not inconsistent with the due administration of justice . . . . The jury, upon whose verdict the event is staked, are presumed to be men capable of understanding what they are called upon to decide, and the Attorney for the State, a gentleman learned in his profession, capable of detecting and exposing the attempts of the opposite counsel to mislead and deceive.

8 Annals of Congress 157 (1805).

The sole and complete purpose of Thoreen's placement of Mason at counsel table was to test the credibility of the government's witnesses in their identification of the defendant as the person engaged in unlawful fishing. The only persons he intended to mislead were the government witnesses. The court of appeals apparently

endorses the principle that where identification is at issue, defense counsel may engage in some tactics which could mislead the government witness to test credibility. United States v. Thoreen, No. 80-3137, slip op. at 4166 n.7 (9th Cir. August 17, 1981). The court of appeals, however, conditions such tactics on prior notification of the court and opposing counsel. The principles set forth above do not call for any such precondition.

In the instant case, Thoreen elected not to notify the court and opposing counsel in advance. He reasoned that to do so would be to run the risk of undermining his strategy. Assuming that the court would have instructed the government attorney not to disclose the substitution to his identification witnesses, Thoreen recognized that the government attorney might nonetheless, even subconsciously, communicate by body language or other

suggestions who and where the defendant was.

The court of appeals decision, a fortiori, would also require a prosecutor trying a rape case to give prior notice to the court and defense counsel before that prosecutor could substitute an individual for the rape victim in order to impeach the defendant's testimony that he had had consensual relations with the victim several times prior to the alleged rape. Considering that this trial tactic, like the one used by Thoreen, could reasonably be expected to aid the search for truth regardless of the court's prior awareness of the precise strategy of counsel, there is neither need nor reason to require counsel to disclose his trial strategy to the court and opposing counsel. There is a necessary and wise tradition that trial tactics and strategy are not proper subjects of discovery. To make them so or risk criminal contempt would in fact chill

innovative and zealous advocacy and in turn hinder the search for truth.

The court of appeals also appears to have rested its affirmance of the criminal contempt conviction on its conclusion that the claimed identification issue did not exist. United States v. Thoreen, No. 80-3137, slip op. at 4161 (9th Cir. August 17, 1981). To be consistent with both In re McConnell and the principles of zealous advocacy, the correct standard must not be whether identification was actually at issue, but whether counsel reasonably believed it to be at issue. In that respect it should be conclusive that the United States Attorney trying the case also believed identification to be a necessary element of the government's proof. He elicited identification testimony from two witnesses and even specifically requested that the record show identification by the witness Severtson. See, United States v.

Thoreen, No. 80-3137, slip op. at 4159 (9th Cir. August 17, 1981).

In United States ex rel. Robson v. Oliver, 470 F.2d 10 (7th Cir. 1972), the court reversed an attorney's conviction for criminal contempt resulting from allegedly improper cross-examination tactics, holding that attorneys are to be given "great latitude" and "extreme liberality" in the area of vigorous advocacy and that where conduct falls in the gray area between zealous representation and actual obstruction all doubts should be resolved in favor of vigorous advocacy. Id., at 13. Relying on In re McConnell, and quoting from In re Dellinger, 461 F.2d 389, 397 (7th Cir. 1972), the court stated that:

> "Where, as here, the conduct complained of is that of an attorney engaged in the representation of a litigant, the search for the essential elements of the crime of contempt must be made with full appreciation of the contentious role of trial counsel

> and his duty of zealous representation of his client's interests."

United States ex rel. Robson v. Oliver, 470 F.2d 10, 12 (1972).

By failing to apply the proper standards for assessing Thoreen's conduct and by miscontruing the nature of defense counsel's obligation not to hinder the court's search for truth, the court of appeals affirmed a conviction of criminal contempt which fails to meet the requirements of intent and actual obstruction of justice and which in its impact has the capacity to chill effective advocacy.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

SCHWEPPE, DOOLITTLE, KRUG,
TAUSEND & BEEZER, P.S.

By _____
FREDRIC C. TAUSEND
Counsel of Record for
Petitioner

October 16, 1981

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,
v.
Harold A. THOREEN,
Defendant-Appellant.

NO. 80-3137

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 5, 1981.

Decided Aug. 17, 1981.

Appeal was taken from judgment of the United States District Court for the Western District of Washington, Jack E. Tanner, J., holding counsel in criminal contempt. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that an attorney may be found in criminal contempt for pursuing a course of zealous advocacy or representing his client in a criminal proceeding such that, without the court's permission or knowledge, he substituted someone for the client at counsel table with intent to cause misidentification, resulting in the misleading of the court,

counsel and witnesses and resulting delay while government reopens its case to identify defendant, all in violation of court order to exclude witnesses from the courtroom and custom of having only the parties and counsel seated in front of the rail.

Conviction affirmed.

1. Criminal Law -- 1081(4)

Notice of appeal filed after the court's announcement of its order but before its entry is timely because it is treated as filed after such entry and on the day thereof.

2. Contempt -- 66(5)

Where on February 27 defendant was found in criminal contempt, order was lodged with the court on March 28 and a signed order was filed and entered on civil docket on March 31, copy of order was sent to counsel on April 7 and on April 11 defendant filed notice of appeal, the

appeal was timely as the clerk did not enter the judgment on the criminal docket and the ten-day period governing criminal appeals had not began to run. F.R.A.P. Rule 4(a, b), 28 U.S.C.A.; 18 U.S.C.A. § 401.

3. Contempt -- 10

Defense counsel should represent his client vigorously, regardless of counsel's view of guilt or innocence; however, counsel's conduct fell outside the mantle of protected behavior and within sphere of criminally contemptuous conduct where, without court's permission or knowledge, counsel substituted another for the client at counsel table with intent to cause misidentification, resulting in misleading of the court, counsel and witnesses and a delay while the government reopened its case to identify defendant and in violation of court order and custom and without

defendant's identification being an issue. 18 U.S.C.A. § 401(1).

4. Criminal Law -- 707

Vigorous advocacy by defense counsel may properly entail impeaching or confusing a witness, even if counsel thinks the witness is truthful, and refraining from presenting evidence even if he knows the truth. Wash. CPR 7.

5. Criminal Law -- 701

Where line between vigorous advocacy and actual obstruction is close, doubts should be resolved in favor of the former. Wash. CPR 7.

6. Criminal Law -- 701

Latitude allowed an attorney in vigorously representing his client is not unlimited and he must represent the client within the bounds of the law and as an officer of the court he must preserve and promote the efficient operation of the system of justice. Wash. CPR 7.

7. Contempt -- 10

Counsel's conduct may cross line from zealous advocacy to actual obstruction where it impedes the court's search for truth and results in delays. 18 U.S.C.A. § 401(1).

8. Contempt -- 7

To be punishable as criminal contempt, contumacious behavior must be wilful and must actually obstruct the judge in performance of his judicial duties. 18 U.S.C.A. § 401(1).

9. Contempt -- 21

One may be found in criminal contempt for disobeying a court order only if the order is clear and definite and the contemnor has knowledge of it. 18 U.S.C.A. § 401(3).

10. Contempt -- 20

Contumacious misbehavior by an attorney includes disobeying a court's rulings

or instructions and deceiving a court. 18 U.S.C.A. § 401(1).

11. Contempt -- 10

Examples of contumacious deceptive behavior punishable as criminal contempt are misrepresenting one's self as a practicing attorney, counsel's swearing to and filing of admittedly false affidavits and supplemental complaint, plus pursuit of meritless litigation and presentation of false evidence. 18 U.S.C.A. § 401(1).

12. Attorney and Client -- 32

Making misrepresentations to the court not only may warrant finding counsel in contempt, but also in appropriate and unprofessional behavior under ethical standards. Wash CPR DR7-102(A)(4-6); EC 7-6, EC 7-26; 18 U.S.C.A. § 401(1).

13. Attorney and Client -- 32

Substituting a person for defendant in a criminal case without a court's knowledge

is an example of unethical behavior. Wash. CPR 7.

14. Attorney and Client -- 32

Ethical standards established the outermost limits of appropriate and sanctioned attorney conduct. Wash. CPR 7; 18 U.S.C.A. § 401(1).

15. Contempt -- 10

While power to discipline or disbar proceeds on very different grounds from those which support a court's power to punish for contempt, ethical bench marks are applied in determining whether counsel's conduct is inappropriate to his role and thus constitutes contumacious behavior punishable as criminal contempt. Wash. CPR DR7-102(A)(4-6); EC 7-6, EC 7-26; 18 U.S.C.A. § 401(1).

16. Contempt -- 10

Counsel's conduct must cause an actual obstruction of justice before criminal contempt lies; standard is whether the

obstruction or disruption is material. 18 U.S.C.A. § 401(1).

17. Contempt -- 6

Seriousness of misbehavior has some bearing on whether conduct is materially obstructive so as to constitute criminal contempt and mere disrespect, insult or affront to a court's sense of dignity are insufficient. 18 U.S.C.A. § 401(1).

18. Contempt -- 7

A pro se litigant's vituperative outburst constitutes an obstruction and may be punishable as criminal contempt because it causes a delay in time involved in litigant's delivery of his outburst and in time necessary to get the court proceedings back on track. 18 U.S.C.A. § 401(1).

19. Contempt -- 20

For criminal contempt purposes, conduct lacking bituperation, violence or physical force may be found obstructive and flouting a court's commands in a polite,

respectful and subdued manner may, in fact, be the essence of obstructing administration of justice. 18 U.S.C.A. § 401(1).

20. Contempt -- 13

Making misrepresentations to the fact finder is inherently obstructive, for purpose of criminal contempt finding because it frustrates the rational search for truth and it may also delay the proceedings. 18 U.S.C.A. § 401(1).

21. Contempt -- 10

Counsel's substituting another for defendant at counsel table was misbehavior that obstructed justice and was inappropriate because it was done without consent and violated court custom to allow only counsel, parties and others having the court's permission to sit forward of the rail. Wash. CPR DR7-106(c)(5); 18 U.S.C.A. § 401(1).

22. Contempt -- 28(1)

Where counsel had practiced for almost five years and had pretrial experience in subject court and presumably in other courts, it could not be said that counsel was unaware of widespread court custom of allowing only counsel, parties and others having court permission to sit forward of rail, counsel's claim that he could not be held in criminal contempt for violating such custom because he lacked notice of it was unpersuasive in criminal contempt proceedings based on counsel's authorized substitution of another for defendant at counsel table. 18 U.S.C.A. § 401(1).

23. Contempt -- 20

Counsel's violation of order to exclude witnesses by keeping at counsel table an individual he had substituted for defendant without court authorization was misbehavior and an independent grounds for

criminal contempt, notwithstanding contention that the substitute would not change his testimony after hearing other testimony and that it was unclear whether substitute would be witness as exclusion order, made at counsel's request, did not distinguish between witnesses who might alter their testimony and those who might not and counsel intended from outset to call substitute after anticipated misidentification occurred. 18 U.S.C.A. § 401(3).

24. Contempt -- 20

Finding of criminal contempt based on violation of order to exclude witnesses was not obviated on ground that permitting individual whom counsel has substituted for defendant to remain at counsel table did not obstruct justice in that substitution was corrected before the ruling in the court-tried case as not only did deception delay proceedings but it impeded court's

ability to ascertain the truth. 18 U.S. C.A. § 401(3).

25. Contempt -- 6

For criminal contempt purpose, reliance on a misrepresentation is not necessary to a finding that deceptive or misleading conduct obstructed justice; delaying or hindering the court's ability to ascertain the truth are sufficient. 18 U.S.C.A. § 401(3).

26. Contempt -- 3

To be held in criminal contempt, the contemnor must have the requisite intent. 18 U.S.C.A. § 401.

27. Contempt -- 3

Although one must have requisite intent to be held in criminal contempt, proof of evil motive or of actual intent to obstruct justice is not necessary. 18 U.S.C.A. § 401.

28. Contempt -- 60(3)

The intent necessary to find one in criminal contempt must be proved beyond a reasonable doubt. 18 U.S.C.A. § 401.

29. Contempt -- 60(1)

For purpose of criminal contempt, an attorney's intent may be inferred if his conduct discloses a reckless disregard for his professional duty. 18 U.S.C.A. § 401.

30. Contempt -- 28(1)

In a criminal contempt proceeding, good faith is a defense to a finding of intent but it does not immunize all conduct undertaken by an attorney on behalf of a client and it requires only that court allow counsel great latitude in his pursuit of vigorous advocacy. 18 U.S.C.A. § 401.

31. Contempt -- 3

Finding of criminal contempt based on misbehavior obstructing the administration

of justice does not require showing of specific intent. 18 U.S.C.A. § 401(1).

32. Contempt -- 10

Counsel's alleged intent to deceive the court or obstruct justice was irrelevant to finding of criminal contempt based on unauthorized substitution of another at counsel table for the defendant; it suffices that counsel should have been aware that his conduct exceeded reasonable limits of advocacy and hindered search for truth. 18 U.S.C.A. § 401(1).

33. Criminal Law -- 652

If identification is at issue, an attorney can test a witness' credibility by notifying the court and counsel that it is and by seeking court's permission to seat two or more persons at counsel table without identifying the defendant, by having no one at counsel table or by holding an in-court lineup. 18 U.S.C.A. § 401; Wash. CPR 7.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT and NORRIS, Circuit Judges, and HATFIELD, District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

I. INTRODUCTION

The issue before us is whether an attorney may be found in criminal contempt for pursuing a course of aggressive advocacy while representing his client in a criminal proceeding such that, without the court's permission or knowledge, he substitutes someone for his client at counsel table with the intent to cause a misidentification, resulting in the misleading of the court, counsel, and witnesses; a delay while the government reopened its case to identify the defendant; and violation of a court order and custom.

---

* Of the District of Montana.

We affirm the district court's finding of criminal contempt. The conclusion that this appeal was untimely is reversed.

II. FACTS

By February 1980, Thoreen, an attorney, had practiced law for almost five years. He was a member of the bars of the State of Washington and of the Western District of Washington. He had made numerous court appearances and participated in one trial and several pretrial appearances before Judge Jack E. Tanner of the Western District of Washington.

In February 1980, he represented Sibbett, a commercial fisher, during Sibbett's non-jury trial before Judge Tanner for criminal contempt for three violations of a preliminary injunction against salmon fishing.[1] In preparing for

---

[1]Mr. Sibbett was one of over 240 fishers prosecuted for violating the injunction. This court affirmed his convictions in U.S. v. Baker, 641 F.2d 1311 (9th Cir. 1981).

trial, Thoreen hoped that the government agent who had cited Sibbett could not identify him. He decided to test the witness's identification.

He placed next to him at counsel table Clark Mason, who resembled Sibbett and had Mason dressed in outdoor clothing--denims, heavy shoes, a plaid shirt, and a jacket-vest.

Sibbett wore a business suit, large round glasses, and sat behind the rail in a row normally reserved for the press.

Thoreen neither asked the court's permission for, nor notified it or government counsel of, the substitution.

On Thoreen's motion at the start of the trial, the court ordered all witnesses excluded from the courtroom. Mason remained at counsel table.

Throughout the trial, Thoreen made and allowed to go uncorrected numerous misrepresentations. He gestured to Mason as

though he was his client and gave Mason a yellow legal pad on which to take notes. The two conferred. Thoreen did not correct the court when it expressly referred to Mason as the defendant and caused the record to show identification of Mason as Sibbett.

Because of the conduct, two government witnesses misidentified Mason as Sibbett. Following the government's case, Thoreen called Mason as a witness and disclosed the substitution. The court then called a recess.

When the trial resumed, the government reopened and recalled the government agent who had cited Sibbett for two of the violations. He identified Sibbett, who was convicted of all three violations.

On February 20, 1980, Thoreen was ordered to appear on February 27 and show cause why he should not be held in criminal

contempt. At the hearing, Judge Tanner found him in criminal contempt.

The order was lodged with the court on March 28. The signed order was filed and entered on the civil docket on March 31. In a letter of April 2, the court clerk said he mailed a copy to Thoreen and to his attorney. Thoreen's copy went to an incorrect address. The order of August 12, however, finds that the clerk did not send a copy to Thoreen's attorney until April 7.

Eleven days later, on April 11, Thoreen filed a notice of appeal.

On July 9, this court entered an order remanding to the district court to rule whether that court's order was entered properly and, if not, whether Thoreen's delay in filing was due to excusable neglect. The district court found (1) the order was entered properly, (2) the clerk mailed a copy to Thoreen's attorney on

April 7, (3) Thoreen filed his notice of appeal one day after the ten-day limit for filing criminal appeals expired, and (4) his delay was not due to excusable neglect because he had notice of the court's ruling from the show cause hearing on February 27.

The action has been docketed consistently as a civil matter as was the underlying contempt action against Sibbett.

III. DISCUSSION

A. JURISDICTION

Federal Rule of Appellate Procedure 4(a) provides that appeals as of right from civil cases shall be filed within 30 days from entry of judgment. Federal Rules of Appellate Procedure 4(b) says that a criminal appeal must be filed within ten

days after entry.[2] A judgment "is entered within the meaning of [4(b)] when it is entered in the criminal docket." Id.

---

[2]FRAP 4.

Rule 4. Appeal as of Right--When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within

Thoreen argues that he filed timely because the case was docketed consistently as a civil matter and the order has never been entered on a criminal docket. The government argues the court lacks jurisdiction because the contempt proceeding was criminal and Thoreen failed to file within the ten-day period.

---

(Footnote 2 continued)

10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

[1,2] We agree with the government that the contempt proceeding was criminal, but hold that Thoreen's appeal was timely because the clerk did not enter the judgment on the criminal docket. The ten-day period had not begun to run. See United States v. Ronne, 414 F.2d 1340, 1342 n.1 (9th Cir.1969). A notice of appeal filed after the court's announcement of its order, but before its entry is timely because it is "treated as filed after such entry and on the day thereof." 9 Wright's Federal Practice, ¶204.20 at 4-133 (1980).

Alternatively, the appeal is timely under Rule 4(a) because it was filed within 30 days of the entry of the judgment on the civil docket.[3]

---

[3]Because we find the appeal timely, we do not reach the excusable neglect issue.

B. CONTEMPT

Judge Tanner found Thoreen in criminal contempt for the substitution because it was imposed on the court and counsel without permission or prior knowledge; the claimed identification issue did not exist; it disrupted the trial; it deceived the court and frustrated its responsibility to administer justice; and it violated a court custom. He found Mason's presence in the courtroom after giving the order excluding witnesses another ground for contempt because Thoreen planned that Mason would testify when the misidentifaction occurred. Judge Tanner held also that Thoreen's conduct conflicted with DR 1-102(A)(4)[4],

---

[4]DR 1-102(A)(4)

DR 1-102 Misconduct.
(A) A lawyer shall not:
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

DR 7-102(A)(6)[5], and DR 7-106(C)(5)[6], of the Washington Code of Professional Responsibility.

Thoreen's principal defense is that his conduct was a good faith tactic in aid of cross-examination and falls within the protected realm of zealous advocacy. He argues that as defense counsel he has no obligation to ascertain or present the truth and may seek to confuse witnesses

---

[5]DR 7-102(A)(6)

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

[6]DR7-106(C)(5)

DR 7-106 Trial Conduct

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

with misleading questions, gestures, or appearances. See United States v. Wade, 388 U.S. 218, 257-58, 87 S.Ct. 1926, 1947-48, 18 L.Ed.2d 1149 (1967) (Justice White, dissenting and concurring in part).

He argues also that (1) in the absence of a court rule controlling who may sit at counsel table, his failure to give notice of the substitution is not misbehavior within 18 U.S.C. § 401(1) (1976); (2) he did not intend to deceive; and (3) the exclusion order was not directed at Mason.

1. Zealous Advocacy

[3] While we agree that defense counsel should represent his client vigorously, regardless of counsel's view of guilt or innocence, Wade, supra; Washington Code of Professional Responsibility (CPR), Canon 7, we conclude that Thoreen's conduct falls outside this protected behavior.

[4,5] Vigorous advocacy by defense counsel may properly entail impeaching or

confusing a witness, even if counsel thinks the witness is truthful, and refraining from presenting evidence even if he knows the truth. Wade, supra. When we review this conduct and find that the line between vigorous advocacy and actual obstruction is close, our doubts should be resolved in favor of the former. Commonwealth of Pennsylvania v. Local 542 International Union of Operating Engineers, 552 F.2d 498, 509 (3rd Cir.), cert. denied sub nom., Freedman v. Higginbotham, 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977).

[6] The latitude allowed an attorney is not unlimited. He must represent his client within the bounds of the law. Wade, supra; CPR Canon 7. As an officer of the court, he must "preserve and promote the efficient operation of our system of justice." Chapman v. Pacific Tel. & Tel., 613 F.2d 193, 197 (9th Cir. 1979).

[7] Thoreen's view of appropriate cross-examination, which encompasses his substitution, crossed over the line from zealous advocacy to actual obstruction because, as we discuss later, it impeded the court's search for truth, resulted in delays, and violated a court custom and rule. Moreover, this conduct harms rather than enhances an attorney's effectiveness as an advocate.

> It is fundamental that in relations with the court, defense counsel must be scrupulously candid and truthful in representations of any matter before the court. This is not only a basic ethical requirement, but it is essential if the lawyer is to be effective in the role of advocate, for if the lawyer's reputation for veracity is suspect, he or she will lack the confidence of the court when it is needed most to serve the client.

American Bar Association Standards for Criminal Justice, The Defense Function 4.9 (1980) (footnote omitted) (herein The Defense Function).

2. Criminal Contempt

18 U.S.C. § 401(1976) provides

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(emphasis added).

[8] Contumacious misbehavior punishable under section 401(1) must be willful, In re Gustafson, 650 F.2d 1017 at 1019-1021 (9th Cir., 1981) (en banc), and must "'actually obstruct'" the district judge in the performance of his judicial duties. Id.

[9] One may be found in contempt for disobeying an order pursuant to section

401(3) "only if the order is clear and definite, and the contemnor has knowledge of it" United States v. Baker, 641 F.2d 1311, 1315 (9th Cir. 1981).

a. Contumacious Misbehavior and Obstruction of Justice

Because Thoreen's conduct was in the court's presence, our inquiry turns to whether it constituted contumacious misbehavior that obstructed the administration of justice.

Misbehavior punishable under section 401(1) has been defined as "conduct inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator." United States v. Seale, 461 F.2d 345, 366 (7th Cir. 1972). See also, Gordon v. United States, 592 F.2d 1215, 1218 (1st Cir.), cert. denied, 441 U.S. 912, 99 S.Ct. 2011, 60 L.Ed.2d 384 (1979). Requiring adherence to these roles ensures "that a judicial proceeding [will

be] confined to a rational search for truth in the context of defined legal issues." Seale, supra, 461 F.2d at 366-67.

[10,11] Contumacious misbehavior by an attorney includes disobeying a court's rulings or instructions, Gustafson, supra, and deceiving the court. Examples of contumacious deceptive behavior are misrepresenting oneself as a practicing attorney, Bowles v. United States, 50 F.2d 848, 851 (4th Cir.), cert. denied, 284 U.S. 648, 52 S.Ct. 29, 76 L.Ed. 550 (1931); an attorney's swearing to and filing of admittedly false affidavits and supplemental complaint, plus the pursuit of meritless litigation, Letts v. Icarian Development Co., S.A., No. 74 C 2252 (N.D.Ill., September 15, 1980); and an attorney's presentation of false evidence, United States v. Ford, 9 F.2d 990, 991 (D.Mont. 1925).

[12] Making misrepresentations to the court is also inappropriate and unprofessional behavior under ethical standards that guide attorneys' conduct. These guidelines, in effect in Washington and elsewhere, decree explicitly that an attorney's participation in the presentation or preservation of false evidence is unprofessional and subjects him to discipline. See CPR DR 7-102(A)(4), (5), (6); EC 7-6, 7-26; The Defense Function 4.93.

[13] Substituting a person for the defendant in a criminal case without a court's knowledge has been noted as an example of unethical behavior by the ABA Committee on Professional Ethics. See Informal Opinion No. 914, 2/24/66 (decided under the former ABA Code of Professional Responsibility).

[14,15] Ethical standards establish the outermost limits of appropriate and sanctioned attorney conduct. While we

adknowledge that a court's power to discipline or disbar an attorney "'proceeds upon very different grounds' from those which support a court's power to punish for contempt," Cammer v. United States, 350 U.S. 399, 408 n.7, 76 S.Ct. 456, 460 n.7, 100 L.Ed. 474 (1956) (quoting Ex Parte Robinson, 86 U.S. 505, 19 Wall. 505, 512, 22 L.ED. 205), we consider and apply ethical benchmarks when determining whether an attorney's conduct is inappropriate to his role and thus constitutes contumacious misbehavior.

[16] Counsel's conduct must cause an actual obstruction of justice before criminal contempt lies. In re Michael, 326 U.S. 224, 228, 66 S.Ct. 78, 80, 90 L.Ed.30 (1945); Gustafson, supra. The standard is whether the obstruction or disruption is material. In re Kirk, 641 F.2d 684, 687 (9th Cir. 1981); Seale, supra, 461 F.2d at 369.

[17] The seriousness of misbehavior has some bearing on whether the conduct is materially obstructive. Seale, supra. Mere disrespect, insult, or an affront to a court's sense of dignity are insufficient. Brown v. United States, 356 U.S. 148, 153, 78 S.Ct. 622, 625, 2 L.Ed.2d 589 (1958); Gordon, supra, 592 F.2d at 1217; United States v. Trudell, 563 F.2d 889, 892 (8th Cir. 1977); Seale, supra.

[18] There is a point where "mere words are so offensive and so unnecessary that their very utterance creates a delay which is an obstruction of justice." Gordon, supra. See Seale, supra, 461 F.2d at 370. A pro se litigant's vituperative outburst, for example, constitutes an obstruction because it causes a delay in the time involved in the litigant's delivery of his outburst and in the time necessary to get the court proceedings back on track. Gordon, supra.

[19] Conduct lacking vituperation, violence, or physical force may be found obstructive. In re Chaplain, 621 F.2d 1272, 1277 (4th Cir.), cert. denied, ___ U.S. ___, 101 S.Ct. 106, 66 L.Ed.2d 40 (1980); Commonwealth of Pennsylvania, supra. Flouting a court's commands in a polite, respectful, and subdued manner has been found to be "the essence of obstructing the administration of justice." Id. See also, United States v. Abascal, 509 F.2d 752, 754 (9th Cir.), cert. denied, 422 U.S. 1027, 95 S.Ct. 2621, 45 L.Ed.2d 684 (1975).

[20] Making misrepresentations to the fact finder is inherently obstructive because it frustrates the rational search for truth. It may also delay the proceedings. In In re Dellinger, 502 F.2d 813, 816 (7th Cir. 1974), cert. denied, 420 U.S. 990, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975), for example, the Seventh Circuit held that

an attorney obstructed justice by putting inadmissible evidence before the jury, hampering its ability to decide the case according to the legal principles provided them. A witness's sham denial of knowledge similarly obstructs justice by closing off avenues of inquiry and stifling a jury's ability to ascertain the truth. United States v. Griffin, 589 F.2d 200, 205 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 48, 62 L.Ed.2d 32 (1979).

[21] The record supports Judge Tanner's conclusion that Thoreen's substitution was misbehavior that obstructed justice. It was inappropriate because it was done without consent, and violated a court custom to allow only counsel, parties, and others having the court's permission to sit forward of the rail. This conduct is deemed unprofessional and may subject an attorney to disciplinary measures in Washington. CPR DR 7-106(C)(5).

[22] Thoreen's argument that he may not be held in contempt for violating the custom and practice because he lacked notice of it is unpersuasive. Generally, "an absence of any warning that borderline conduct is regarded as contumacious could be fatal to a contempt citation." Seale, supra, 461 F.2d at 366. See also, Baker, supra, 641 F.2d at 1315. Nevertheless, a contemnor need not have specific warning or be aware that his acts may subject him to criminal sanctions as opposed to other penalties. Seale, supra. Certain conduct is inherently inappropriate and self-noticing. Gordon, supra, 592 F.2d at 1218 n.3.

In federal and state courts of general jurisdiction, only attorneys and parties customarily sit at counsel table. Others do so only with the court's permission.

Thoreen's years in practice included trial and pretrial experience in Judge

Tanner's court and presumably in other courts. Viewing the evidence in the light most favorable to the government, we cannot accept Thoreen's contention that he was unaware of this widespread custom.

[23] His violation of the order to exclude witnesses by keeping Mason at counsel table is both a second example of misbehavior and independent grounds for contempt under § 401(3). He argues, however, that he did not violate the order because it was not directed at Mason because (1) Mason would not change his testimony after hearing other testimony and (2) it was unclear that Mason would be a witness.

This argument belies the facts. The order, made at Thoreen's request, did not distinguish between witnesses who might alter their testimony and those who might not. He acknowledges that he intended from the outset to call Mason as a witness after

the anticipated misidentification occurred. By failing to have Mason leave, he made an unfortunate error in judgment. See, e.g., United States v. Baer, 575 F.2d 1295, 1301 (10th Cir. 1978) (an attorney's attempt to disprove that he was the person charged with two traffic violations (1) when he knew he was the person charged and (2) by relying on the failure to place "Jr." following his name, is inexcusable, tragic gamesmanship); In re Serra, 484 F.2d 947, 948 (9th Cir. 1973) (contemptuous for an attorney to frustrate a court discovery order to produce medical reports by instructing the medical witness to make no written reports).

[24] Thoreen's argument that the substitution did not obstruct justice because he corrected it before the court ruled on it, see, e.g., United States v. Turk, 10 F.Supp. 957, 959 (E.D.N.Y. 1934) (a correction of perjurious testimony

before the court issued its decision purged contempt), ignores the evidence of obstruction and disruption that occurred despite his revelation. The deception delayed proceedings in the time taken for witnesses' misidentification of the defendant and the time required to recall one witness to identify Sibbett correctly. Of greater importance is that it impeded the court's ability to ascertain the truth.

[25] Nor is reliance on a misrepresentation necessary to a finding that deceptive or misleading conduct obstructed justice. Delay or hindering the court's ability to ascertain the truth are sufficient.

b. Intent

[26] To be held in criminal contempt, the contemnor must have the requisite intent.

> "[A]n attorney possesses the requisite intent only if he knows or reasonably should be aware in view

> of all the circumstances, especially the heat of the controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth." (citation omitted).

In re Kirk, supra, 641 F.2d at 687.

[27,28] Proof of an evil motive or of an actual intent to obstruct justice is unnecessary. Commonwealth of Pennsylvania, supra, 552 F.2d at 510; Seale, supra, 461 F.2d at 398. Intent must be proved beyond a reasonable doubt. Baker, supra, 641 F.2d at 1317; In re Kirk, supra.

[29] Intent may be inferred from facts and circumstances. Baker, supra. An attorney's intent may be inferred if his "conduct discloses a reckless disregard for his professional duty." In re Farquhar, 492 F.2d 561, 564 (D.C.Cir. 1973) (citation omitted).

[30] Good faith is a defense to a finding of intent, Baker, supra, but it does not immunize all conduct undertaken by

an attorney on behalf of a client. Seale, supra. It requires only that a court allow an attorney great latitude in his pursuit of vigorous advocacy. Id.

Thoreen admits he planned and intended the substitution, but defends by asserting that (1) it was a good faith effort to prove misidentification and attack the credibility of the government witnesses; (2) he never intended to misrepresent any facts to the court or to obstruct justice; and (3) he believed the court knew Sibbett's identity from the pretrial hearing.

The record shows that Sibbett's identification was not an issue, contradicting the need to attack credibility. The testimony about Sibbett's violations was thorough, credible, and not in conflict.

Thoreen's alleged belief that the court would remember Sibbett from a pretrial proceeding is unrealistic because that hearing took place several months

earlier and Sibbett was but one of many persons cited for violating the salmon fishing injunction.

[31,32] His alleged lack of intent to deceive the court or to obstruct justice is irrelevant. Section 401(1) does not require specific intent. It suffices that he should have been aware that his conduct exceeded reasonable limits and hindered the search for truth.

CONCLUSION

[33] Thoreen's error in judgment was unfortunate. The court's ire and this criminal contempt conviction could have been avoided easily and the admirable goal of representing his client zealously preserved if only he had given the court

and opposing counsel prior notice and sought the court's consent.[7]

Nonetheless, viewing the evidence in the light most favorable to the government, we find that there is sufficient evidence to find beyond a reasonable doubt that Thoreen violated 18 U.S.C. § 401(1) and (3). Baker, supra. The district court's findings were not clearly erroneous. Id. We AFFIRM the contempt conviction. We REVERSE the finding that this appeal was untimely.

---

[7]While finding Thoreen's tactic misleading and obstructive of justice, we acknowledge that certain variations are acceptable. If identification is at issue, an attorney could test a witness's credibility by notifying the court and counsel that it is and by seeking the court's permission to (1) seat two or more persons at counsel table without identifying the defendant; see Duke v. State, 260 Ind. 638, 298 N.E.2d 453 (1973); (2) have no one at counsel table; (3) hold an in-court lineup.

APPENDIX B

Filed in the
UNITED STATES DISTRICT COURT
March 28, 1980

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | NO. MS80-19T |
| v. | ) | ORDER OF |
| HAROLD THOREEN, Defendant. | ) | CONTEMPT |

On February 20, 1980, this Court entered an order directing Harold Thoreen to appear before this Court on February 27, 1980 to show cause why he should not be held in criminal contempt for his conduct before this Court on February 15, 1980.

On February 27, 1980, the attorney for the Government and the defendant, appearing in person and by Murray B. Guterson, his counsel, appeared before this Court for the trial of this cause.

By agreement of the parties the Government's case having been submitted on stipulated facts, and the defendant

having been given the opportunity to address the Court through his counsel and directly by testimony of the defendant, and the Government having presented testimony in rebuttal, the Court finds as follows:

That on February 15, 1980, during the trial of United States v. William Ryan Sibbett, No. MS78-98T, HAROLD THOREEN, an attorney admitted to practice before this Court, did engage in the following course of conduct.

1. Without the permission of the Court and without the knowledge of counsel for the Government, HAROLD THOREEN brought before the bar and seated at counsel table one Clark Mason, a person who was neither an attorney nor the defendant. This departure from the well known custom and practice of Federal District Courts, and this Court in particular, was in direct violation of DR 7-106(c)(5) of the ABA Code of Professional Responsibility.

2. Mr. Mason was dressed as one would dress for an outdoor occupation, wearing denim pants, heavy shoes, plaid shirt and jacket-vest.

3. HAROLD THOREEN, in questioning Government witnesses concerning statements of William Ryan Sibbett, referred to Clark Mason as his client and gestured toward him in a manner calculated to identify Clark Mason as the one who made the statements.

4. Clark Mason and HAROLD THOREEN openly exchanged notes and conferred during the course of the trial in a manner calculated to make it appear as if Clark Mason was actively participating in his own defense.

5. HAROLD THOREEN caused Clark Mason to remain in the courtroom after Mr. THOREEN sought and obtained an order from the Court excluding witnesses from the courtroom, knowing full well that he

intended to call Clark Mason as a witness if matters proceeded as he had planned.

6. William Ryan Sibbett remained in the audience portion of the courtroom during the trial of United States v. Sibbett, No. MS78-98T, wearing a three-piece suit and very large round eyeglasses.

7. On two occasions, upon request of counsel for the Government, the Court indicated that the record could reflect an identification of the defendant. On another occasion, the Court referred to Mr. Mason as HAROLD THOREEN's client during a ruling on the admissibility of statements made by William Ryan Sibbett. On all three occasions, the fact that the Court had in fact been deceived by the presence of Clark Mason at counsel table became manifest to HAROLD THOREEN, yet he took no step to inform this Court of the true state of affairs.

The intent and effect of said course of conduct was to deceive the Court and counsel for the Government into believing that Clark Mason was the defendant, William Ryan Sibbett, and to cause a misidentification during the Government's case-in-chief.

The intent and effect of said course of conduct was to obstruct the administration of justice and disrupt the trial of United States v. Sibbett, No. MS78-98T.

HAROLD THOREEN testified at the trial of this matter that he planned the substitution of Mr. Mason for William Ryan Sibbett because there was an issue as to the credibility of the Government's witnesses. The Court finds such an assertion to be utterly without merit. The National Marine Fisheries agent who testified at trial was both candid and thorough and the Court finds his testimony to be highly credible. In addition, although the operator of the Coast Guard vessel upon

which the agent was a passenger did not see everything that the agent saw, he was occupied with operating the vessel. Hence, there was no conflict between the testimony of the two Government witnesses who saw the fishing violation which was at issue. In view of that finding, it is unnecessary to comment on the inappropriateness of Mr. THOREEN's tactic as a device to test the credibility of witnesses.

In addition to amounting to a deceit on the Court and causing the disruption of a trial, the conduct of HAROLD THOREEN conflicted with a number of Disciplinary Rules of the Code of Professional Responsibility.

Disciplinary Rule 1-102a(4) provides that a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Likewise, Disciplinary Rule 7-102A(6) provides that a lawyer shall not "[p]articipate in the

creation of a preservation of evidence when he knows or it is obvious that the evidence is false." In addition, the course of conduct followed by Mr. THOREEN violated Disciplinary Rule 7-106(c)(5), which provides that a lawyer shall not:

> Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

For the above-stated reasons, it is ADJUDGED that the defendant has been convicted of the offense of violation of Title 18, United States Code, Section 401(1), misbehavior in the presence of the court so as to obstruct the administration of justice, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is

ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine to the United States in the sum of One Thousand Dollars ($1,000.00) within thirty (30) days of the date of imposition of sentence.

DATED this 31 day of March, 1980.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Jose E. Gaitan
JOSE E. GAITAN
Assistant United States Attorney

# Opposition

Office - Supreme Court, U.S.
FILED
JAN 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-748

# In the Supreme Court of the United States

OCTOBER TERM, 1981

HAROLD A. THOREEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

KATHLEEN A. FELTON
ELLEN BYERS
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether petitioner's conduct as defense counsel during a trial in district court constituted willful misbehavior obstructing justice under 18 U.S.C. 401(1).

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 11 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Brown, In re*, 454 F.2d 999 | 5, 9 |
| *Chaplin, In re*, 621 F.2d 1272, cert. denied, 449 U.S. 834 | 9 |
| *Clark* v. *United States*, 289 U.S. 1 | 5 |
| *Farquhar, In re*, 492 F.2d 561 | 3, 5, 7, 9 |
| *Kirk, In re*, 641 F.2d 684 | 9 |
| *McConnell, In re*, 370 U.S. 230 | 6 |
| *Powell* v. *Ward*, 643 F.2d 924 | 4 |
| *United States* v. *Bailey*, 444 U.S. 394 | 9 |
| *United States* v. *Baker*, 641 F.2d 1311 | 8 |
| *United States* v. *Cunningham*, 599 F.2d 120 | 3 |
| *United States* v. *Greyhound Corp.*, 508 F.2d 529 | 9 |
| *United States* v. *Seale*, 461 F.2d 345 | 9 |
| *United States* v. *Trudell*, 563 F.2d 889 | 9 |
| *United States* v. *Washington*, 459 F. Supp. 1020, aff'd *sub nom. Puget Sound Gillnetters Association* v. *United States District Court*, 573 F.2d 1123, vacated and remanded *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 | 2 |
| *Williams, In re*, 509 F.2d 949 | 9 |


Constitution and statutes:


| | |
|---|---|
| United States Constitution, Sixth Amendment | 10 |
| 18 U.S.C. 401 | 9 |
| 18 U.S.C. 401(1) | 2, 4, 6, 8, 9 |

Miscellaneous: Page

*ABA Code of Professional Responsibility* (1976).. 7
*ABA Standards for Criminal Justice, The Defense Function* (1980) ..... 7

# In the Supreme Court of the United States

OCTBER TERM, 1981

---

No. 81-748

HAROLD A. THOREEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 653 F.2d 1332.

### JURISDICTION

The judgment of the court of appeals was entered on August 17, 1981. The petition for a writ of certiorari was filed on October 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a hearing before the United States District Court for the Western District of Washington, petitioner was convicted of criminal contempt, in viola-

tion of 18 U.S.C. 401(1).[1] He was sentenced to a fine of $1,000.

In February 1980, petitioner appeared as defense counsel in a non-jury trial in the United States District Court for the Western District of Washington. He represented William R. Sibbett, a commercial fisherman charged with criminal contempt for three violations of an injunction against salmon fishing issued in *United States* v. *Washington*, 459 F. Supp. 1020 (W.D. Wash.), aff'd *sub nom. Puget Sound Gillnetters Association* v. *United States District Court*, 573 F.2d 1123 (9th Cir. 1978), vacated and remanded on other grounds *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979).

Before trial, petitioner arranged for one Clark Mason, a man of the same size, age, and hair color as Sibbett, to sit at counsel table with him in place of the real defendant. Sibbett, the actual defendant, sat behind the rail in the audience portion of the courtroom. Mason was dressed as a fisherman might dress, in denim pants, heavy shoes, plaid shirt, and a jacket vest. Sibbett wore a three-piece suit (Pet. App. A46-A47). The substitution of Mason for Sibbett was done without notice to the court or the prosecutor (*id.* at A17).

At the outset of trial, petitioner requested and obtained an order from the court excluding witnesses

---

[1] 18 U.S.C. 401(1) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.

from the courtroom. Nevertheless, Mason, whom petitioner intended to call as a witness, remained at counsel table (Pet. App. A47-A48). During the course of the trial, petitioner repeatedly referred to Mason as his client and conferred and exchanged notes with him as if Mason were actively participating in the defense (*id.* at A47). When the court referred to Mason as the defendant, petitioner did not inform the court of the true state of affairs (*id.* at A48).

As a result of this conduct, two government witnesses misidentified Mason as Sibbett (Pet. App. A18). Following the government's case, petitioner called Mason as a witness and disclosed the substitution. The court then recessed the trial for a week (Pet. 8). The government later reopened its case and recalled a government agent, who correctly identified Sibbett. Sibbett was ultimately convicted (Pet. App. A18), and his conviction was affirmed. *United States* v. *Baker*, 641 F.2d 1311, 1318-1320 (9th Cir. 1981).

Following the trial, petitioner was ordered to appear and show cause why he should not be held in criminal contempt. After a hearing at which petitioner, his counsel, and the prosecutor were present, the court adjudged petitioner in contempt (Pet. App. A45). The court of appeals affirmed his conviction (*id.* at A1-A44), concluding that petitioner's substitution of Mason for his client "crossed over the line from zealous advocacy to actual obstruction" of justice (*id.* at A28). In addition, the court held that the substitution, as well as petitioner's violation of the court's order, constituted "a reckless disregard [of petitioner's] professional duty" (*id.* at A41, quoting *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973)), resulting in an actual obstruction of justice (*id.* at A36).

## ARGUMENT

Petitioner concedes (Pet. 6) that he did not request the court's approval or notify the court or the prosecutor of the substitution of Mason for his client and that he allowed Mason to remain at counsel table after petitioner had requested and obtained an order from the court excluding all witnesses from the courtroom. Petitioner concedes as well (Pet. 7), for purposes of this petition, that "throughout the government's case [petitioner] made and allowed to go uncorrected numerous misrepresentations which suggested to the government's witnesses that the individual [seated] at the counsel table was in fact the defendant Sibbett." And, finally, he concedes that he did not correct the court when it referred to Mason as the defendant in the course of an evidentiary ruling or when it acceded to the prosecutor's request that the record show a government witness's identification of Sibbett as the defendant, when in fact it was Mason who had been so identified. Nonetheless, petitioner argues that his conviction for criminal contempt under 18 U.S.C. 401(1) should not have been sustained. This contention is without merit.

1. Petitioner argues (Pet. 16-19) that there was no showing in this case of an actual obstruction of justice to support his conviction under 18 U.S.C. 401(1). He relies principally upon this Court's decision in *In re McConnell*, 370 U.S. 230 (1962). This reliance is misplaced. In *McConnell*, the Court reversed the contempt conviction of a lawyer for his statements expressing his intent to persist in questioning the court had prohibited. But the Court stressed that although counsel had stated that he intended to ask the questions unless the bailiff stopped him, the bailiff in fact never had to interrupt

the trial to arrest the lawyer because the lawyer did not thereafter ask any questions along the line that the judge had forbidden. 370 U.S. at 235-236. Here, in contrast, the trial was interrupted because the court found it necessary to call a recess for a week after the disclosure of petitioner's substitution of Mason for the defendant and the attendant misrepresentations, and in addition, "[t]he deception delayed proceedings in the time taken for witnesses' misidentification of the defendant and the time required to recall one witness to identify Sibbett correctly" (Pet. App. A40). "Of greater importance," as the court of appeals observed, "is that [the deception] impeded the court's ability to ascertain the truth" (*ibid.*). Cf. *Clark* v. *United States*, 289 U.S. 1, 11 (1933).[2]

Petitioner contends (Pet. 18) that an obstruction of justice would have resulted in the circumstances of this case only if, for example, the court had convicted the wrong man (Mason rather than Sibbett) or if the court had relied on its assumption that the person sitting at counsel table was the defendant in making a material ruling. We quite agree that these

---

[2] Petitioner's reliance (Pet. 16-17) on *In re Brown*, 454 F.2d 999 (D.C. Cir. 1971), for the proposition that there was no obstruction of justice here is misplaced. There, the court expressly found that the appearance by counsel who had not been admitted to practice before the district court "did not disrupt judicial proceedings, cause expense or produce delay. On the contrary, his activities moved the matter * * * along." 454 F.2d at 1004 (footnote omitted). Similarly, nothing in *In re Farquhar*, 492 F.2d 561 (D.C. Cir. 1973), also relied upon by petitioner (Pet. 16-17), supports his contention that there was no obstruction of justice here. There, the court reversed the conviction of contempt of a lawyer who was eight minutes late for a scheduled appearance, but the reversal was based on the absence of the requisite intent, not on a conclusion that there had been no obstruction of justice.

consequences would constitute obstructions of justice, but we do not agree that Section 401(1) is so limited in scope. Here, petitioner's misrepresentations tainted the integrity of the proceedings and delayed their resolution. Moreover, even if petitioner were correct that "detrimental reliance" by the court is necessary (see Pet. 18-19), that standard was satisfied here. The court, in reliance on petitioner's misrepresentation, directed that the record show that a government witness had identified the defendant Sibbett, when in fact it was Mason who was so identified. Similarly, the court issued an order, at petitioner's request, requiring the exclusion of witnesses from the courtroom, but Mason was able to remain because of the impression petitioner had created that Mason was the defendant. To be sure, the true state of affairs became known before the trial was completed; but an attorney, as an officer of the court, cannot be permitted to take matters into his own hands and determine for what period of time the proceedings should be infected by a misrepresentation on a matter so basic as which person is on trial.

2. Petitioner also contends that he did not have the intent necessary to support a conviction for criminal contempt under 18 U.S.C. 401(1). This contention, too, must be rejected. The court of appeals held that misbehavior punishable under Section 401(1) must be "willful" (Pet. App. A29) and that an attorney possesses the requisite intent " 'only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of the controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth' " (*id.* at A40-A41, quoting *In re Kirk*, 641 F.2d 684, 687 (9th Cir. 1981)). The

court concluded as well that the requisite intent may be inferred if the attorney's " 'conduct discloses a reckless disregard for his professional duty' " (Pet. App. A41, quoting *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973)).

This standard clearly was satisfied here. As the court of appeals observed, making misrepresentations to the court is "inappropriate and unprofessional behavior under ethical standards that guide attorneys' conduct" (Pet. App. A32)—standards which "decree explicitly that an attorney's participation in the presentation or preservation of false evidence is unprofessional and subjects him to discipline" (*ibid.*, citing the *ABA Code of Professional Responsibility*, Disciplinary Rules 7-102(A)(4), (5) and (6), and Ethical Considerations 7-6 and 7-26 (1976); *ABA Standards for Criminal Justice, the Defense Functions* § 4.9 (1980)). The three Disciplinary Rules just cited, for example, state that a lawyer shall not "[k]nowingly use perjured testimony or false evidence," "[k]nowingly make a false statement of law or fact," or "[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." In addition, DR 7-102(A)(3) provides that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."

Petitioner's conduct falls squarely within these prohibitions. He concedes that he made and allowed to go uncorrected numerous misrepresentations that the person at counsel table was the defendant. It is no answer that the misrepresentations eventually were revealed: the disciplinary rules contain no exception for an attorney's temporary use of false evidence or for knowingly false statements of fact that later are corrected; to the contrary, DR 7-102(A)(6), for ex-

ample, prohibits "the creation *or* preservation" of false evidence (emphasis added).

Nor can there be any doubt in this case that petitioner's conduct was deliberate. The seating and dress of Mason and the defendant concededly were orchestrated to convey an erroneous impression of who the defendant was, and it was obvious to petitioner as the trial proceeded that the court, the prosecutor, and government witnesses all were deceived as expected. In addition, petitioner disobeyed the court's order regarding the exclusion of witnesses. In these circumstances, petitioner's contention (Pet. 15) that he did not intend to deceive the court is singularly unpersuasive, and the district court found that the intent and effect of petitioner's course of conduct was to deceive the court and counsel and to cause a misidentification. Pet. App. A49.

Petitioner apparently also contends (Pet. 15) that he did not intend to obstruct justice. However, the district court correctly found to the contrary (Pet. App. A49). Petitioner's course of conduct was calculated to deceive all concerned regarding the identity of the person on trial, and the effects of the misrepresentation, once revealed, were entirely foreseeable. If petitioner means to argue that he did not know that those consequences constitute obstruction of justice in the contemplation of the law and that he therefore did not specifically intend to violate Section 401(1), the court of appeals correctly concluded that specific intent of this type need not be shown. Nothing on the face of the statute suggests that it has such a narrow scope (cf. *United States* v. *Bailey*, 444 U.S. 394, 408 (1980)), which might prove inadequate for the courts to protect themselves against contumacious conduct occurring in their presence.

Petitioner's assertion of a conflict with the District of Columbia Circuit regarding the standard of intent under Section 401(1) similarly is without merit. The Ninth Circuit in this case expressly followed the D.C. Circuit's decision in *In re Farquhar, supra*, upon which petitioner relies (Pet. 16-17) in asserting a conflict. In *Farquhar* the D.C. Circuit held that a showing of a general intent to commit the contemptuous act is sufficient and that the requisite intent may be inferred from a reckless disregard of professional duty. 492 F.2d at 564. The D.C. Circuit's opinion in the other case relied upon by petitioner, *In re Brown*, 454 F.2d 999 (D.C. Cir. 1971), is to the same effect. See 454 F.2d at 1006-1007.[3] See also *In re Chaplin*, 621 F.2d 1272, 1277 (4th Cir.), cert. denied, 449 U.S. 834 (1980); *United States* v. *Cunningham*, 599 F.2d 120, 128 (6th Cir. 1979); *United States* v. *Trudell*, 563 F.2d 889, 893 (8th Cir. 1977); *In re Joyce*, 506 F.2d 373, 378 (5th Cir. 1975); *United States* v. *Greyhound Corp.*, 508 F.2d 529, 531-532 (7th Cir. 1974); *United States* v. *Seale*, 461 F.2d 345, 368 (7th Cir. 1972); cf. *Powell* v. *Ward*, 643 F.2d 924, 933 n.12 (2d Cir. 1981); *In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975).

---

[3] Petitioner selectively quotes from *Brown* (see Pet. 12) for the proposition that knowledge that one's act is wrongful and a purpose nevertheless to commit it are essential elements for a conviction under Section 401. This standard is satisfied in this case, for petitioner, as an attorney and an officer of the court, must be taken to have known that the making of misrepresentations to the court and disobedience of a court order were wrongful. The passage from *Brown* does not suggest that, in addition, a specific purpose to violate Section 401 must be shown, as evidenced by the court's statement elsewhere in the same passage that a showing of general intent will suffice.

3. Finally, petitioner contends (Pet. 19-27) that his conviction for contempt impairs the Sixth Amendment guarantee of effective assistance of counsel by unnecessarily restricting defense counsel's freedom in cross-examining and impeaching prosecution witnesses. This contention is wholly without merit.

The court of appeals observed that petitioner's conviction for criminal contempt could have been avoided and his duty zealously to represent his client preserved if he had given the court and prosecutor prior notice of his proposed course of conduct and sought the court's consent for it. Pet. App. A43-A44. Petitioner objects to this alternative, contending (Pet. 23-24) that even if the court had instructed the prosecutor not to disclose the substitution to government witnesses, the prosecutor might have communicated subconsciously, by "body language or other suggestions," who and where the defendant was. However, even granting the dubious assumption that such speculative concerns would warrant keeping the prosecutor ignorant of the true state of affairs, these concerns furnish no justification for petitioner's failure to notify the *court* and to request its consent for his ploy. And, as the court of appeals observed (Pet. App. A44 n.7), there were other ways in which petitioner could have sought to develop the identification issue without misrepresentation to the court or opposing counsel; he could have requested permission to seat several persons—or no one—at counsel table when the identifying witnesses were in the courtroom, or requested an in-court line-up.[4] Thus, there is no basis

[4] We do not mean to suggest that the district court would have erred in denying any of these requests. The point here is that petitioner should have proceeded forthrightly and proposed one or more of these alternatives. Whether a re-

for petitioner's contention that the decision below improperly impairs an attorney's ability to engage in zealous advocacy.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*
D. LOWELL JENSEN
*Assistant Attorney General*
KATHLEEN A. FELTON
ELLEN BYERS
*Attorneys*

JANUARY 1982

---

fusal to accede to such suggestions would have been error was a matter that could then be taken up on appeal if petitioner's client were convicted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 364823 765